Sweet Victory in Florida: Eleventh Circuit gives go-ahead to F.A.C. case

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By Larry . . . The U.S. Court of Appeals for the Eleventh Circuit has breathed new life into the case of ***Does v. Richard L. Swearingen***. While this is indeed good news, NARSOL cautions that we not become too giddy. The court noted that ". . . the constitutionality of the registry law is not before us– we must determine whether the plaintiffs' claims are timely." This means that the underlying claims must be fully adjudicated by the District Court upon remand from the Eleventh Circuit.

The plaintiffs, whose offenses predate the existence of registration in Florida, have been subject to this reporting structure since the registry law was enacted in 1997. The state moved to dismiss the complaint, contending in part that the underlying basis for the claims accrued long ago. For each claim, the state traced the alleged injury to an amendment to the registry law and measured the limitations period from that

amendment’s effective date. The plaintiffs responded that they were not challenging their designation as sex offenders but the constitutionality of second-generation registration burdens and the continuing threat of imprisonment for failing to meet them. The district court dismissed the claims, agreeing with Florida that the plaintiffs’ injuries stem from one-time acts, the enactment of each provision that allegedly injures them. Therefore, under the applicable statute of limitations, they [plaintiffs] were required to sue within four years of the date that each provision that imposed the challenged burdens was enacted. This decision from the Eleventh Circuit is the result of an appeal.

The plaintiffs alleged the following facts which the court must accept as true. The plaintiffs committed qualifying offenses prior to 1997, meaning they were registered for more than twenty years prior to the 2018 amendments. John Does 1 and 7 each report in person about eight times per year to re-register and report information changes, such as those caused by travel. Neither has been arrested for violating the registry law, but they fear that the law has become so onerous that an inadvertent failure to register is unavoidable. John Doe 6 suffers from a mental disability that requires him to depend on his sister to comply with his registration requirements, including his obligation to report in person four times a year. Before his sister began helping him, John Doe 6 was arrested twice for failing to comply with requirements that he did not understand. Like the other plaintiffs, he fears that the registry law now virtually ensures his future incarceration.

The Appeals Court noted that over the past twenty-five years, the Florida legislature amended the registry law more than a dozen times. The information collected now ranges from basic identifying information like a registrant’s permanent address to details like the license tag number of his roommate’s car. Any change to this information triggers a registrant’s duty to

report, and failure to comply is a third-degree felony. The plaintiffs alleged that the reporting requirement became intolerable in 2018, when Florida again amended the registry law. Registrants are now required to report any absence from their permanent residence, for any reason, that lasts more than three days.

The case was salvaged by the ***Continuing Violations Doctrine***. According to the Court, "The continuing violation doctrine permits a plaintiff to sue on an otherwise time-barred claim when additional violations of the law occur within the statutory period." If a defendant's actions violate a plaintiff's rights on a repeated or ongoing basis, then a cause of action may be timely even if the first violation took place outside the statute of limitations, citing ***Calloway v. Partners Nat'l Health Plans***, 986 F.2d 446, 448–49 (11th Cir. 1993). The Court stated, "We believe the plaintiffs have alleged a continuing violation. The registry law requires the plaintiffs to make multiple in-person reports each year, even if nothing about their registration information changes. In addition to that requirement, each day the plaintiffs must try to determine whether an action they take—whether, for example, they wish to purchase a new car, book a weekend trip, or create a new online account—requires making an in-person report. The complaint contends that these reports are time-consuming and burdensome, and the plaintiffs allege that they have forgone certain opportunities because of the likelihood that they would have to report information to the Commissioner."

The plaintiffs also argued that they have been injured by their very classification as sex offenders. They contend that they are being unconstitutionally punished under the Eighth Amendment because the law imposes obligations on them "until they die" without any individualized assessment of their risk of re-offense. The court stated, "We believe the counts about this alleged injury are based on nothing more than the

lingering effects of the plaintiffs' initial designation as sex offenders, which occurred over twenty years prior to this lawsuit. The plaintiffs were either provided with appropriate process before they were 'punished' by being placed on the list, or they were not." This means that this specific claim is dead.

The case, however, is very much alive, and NARSOL is grateful for the work done by our affiliate, the Florida Action Committee. We look forward to reporting more on this case as it develops in the District Court.